IN THE

Supreme Court of the United States

October Term 1953

No. 22

THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY,

Appellant,

vs.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA and CITY OF LOS ANGELES,

Appellees.

Appeal From the Supreme Court of California.

BRIEF OF APPELLEE CITY OF LOS ANGELES.

ROGER ARNEBERGH,
City Attorney,
BOURKE JONES,
Assistant City Attorney,
Suite 400 City Hall,
Los Angeles 12, California,
Counsel for Appellee, City of Los Angeles.

Parker & Company, Law Printers, Los Angeles. Phone MA. 6-9171.

SUBJECT INDEX

TABLE OF AUTHORITIES CITED

STATUTES

IN THE

Supreme Court of the United States

October Term 1953

No. 22

THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY,

Appellant,

vs.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA and CITY OF LOS ANGELES,

Appellees.

Appeal From the Supreme Court of California.

BRIEF OF APPELLEE CITY OF LOS ANGELES.

Foreword.

The City of Los Angeles, one of the appellees in the above-entitled cause, files this separate brief in reply to that portion of the joint brief for appellants filed in this case and in *Southern Pacific Co. v. Public Utilities Commission*, No. 43, for the following reasons:

1. The factual situation in the two cases is entirely different. The basis of appellant's obligation in the case at bar is obscured and minimized by the method adopted

by appellants in presenting their respective cases by unsupported and unfounded generalizations asserted in their joint brief. This case does not involve the elimination of an existing grade crossing as in the *Southern Pacific Company* case No. 43. This case involves the elimination of obstructions in one of the main thoroughfares of the city in one of its principal industrial districts, which provide an opening of only twenty feet for vehicular traffic beneath the Santa Fe tracks, despite the fact that the street easement at this point is ninety feet in width.

2. In this case the facts are that the cost of making a necessary improvement in a city street is $812,765, of which amount $701,015 is due to the presence of railroad structures within the public street easement. Under the order here involved, the Railroad would pay only $284,677.50, thus imposing a net cost on the City of $417,337.50, for the privilege of removing the railroad structures now within the street easement and rebuilding them with modern structures designed to permit the City to use its presently needed full street easement without interference with operation of the Railroad.

3. The City of Los Angeles was the applicant who filed the petition for the order of the California Public Utilities Commission which gives rise to this appeal and the City was made a party respondent to the case in the Supreme Court of California. The City is also one of the named appellees on the appeal to this Honorable Court, and not in any secondary capacity or merely as a real party in interest, as intimated on page 2 of the joint brief of appellants.

Statement of the Case.

The record made before the California Public Utilities Commission is not before this Court. Its absence will be commented on further in discussing the jurisdictional question presented. However, enough appears to disclose that the basic and salient facts of the case fully warrant and sustain the order made by the Commission.

The opinion on rehearing of the California Public Utilities Commission [R. 116-130]* states:

> "The record discloses that Washington Boulevard is a public street extending from the westerly boundary of the City of Los Angeles at the Pacific Ocean in the Venice area, and easterly through the entire breadth of the City and then for a distance of several miles east of the easterly boundary of the City. The grade separations are in the City in an area which constitutes one of the principal industrial districts. Washington Boulevard throughout most of its length has a paved surface of at least 60 feet in width, with a few exceptions where the pavement width varies from 40 to 60 feet. At the site of the existing grade separations, here under consideration, the roadway narrows down to 20 feet in width, and the vertical clearance is between 13 feet and 14 feet. The City's easement at this point is 90 feet." [R. 118.] * * *
>
> "The City of Los Angeles further presented a land use map of Washington Boulevard between Alameda Street and Soto Street [Ex. No. 62 R. H.] tending to show that Washington Boulevard in the vicinity of the underpasses here in question is not a freeway but is used as an access street to the adjacent properties.

---

*References are to pages of the Printed Transcript of Record.

"After a careful consideration of all of the evidence adduced herein, and in the light of the evidence adduced in the original hearings, having the benefit of the briefs and oral arguments which have been presented, we conclude to affirm our prior findings to the effect that there is a need for widening and increasing the height of the existing underpasses.

"We also find that the preferred plan of the City of Los Angeles, as set out in Exhibit No. 13, heretofore described, sets out the construction which would be most practicable and best meet the public safety, convenience and necessity in this matter." [R. 126.] * * *

"In the instant case, the proposed widening of Washington Boulevard is to meet local transportation needs, and the City's contribution thereto must come entirely from local funds." [R. 129-130.] * * *

"* * * The proposed structure would result in a new bridge to replace one that is 75 per cent depreciated, and the new bridge would conform to the recommended 'live loading' standards or *Cooper* ratings whereas the present structures do not.

"As previously pointed out herein, the estimated costs of the proposed structures which may be said to be attributable to the presence of the railroad tracks for two divided span bridges is $569,355. The remaining costs are clearly attributable to the paving and widening of the street. We find that this amount of $569,355 is the amount of costs which should be allocated in this proceeding.

"After a full consideration of all of the evidence, briefs and oral argument presented in this matter, we hereby find it to be in the public interest to authorize the widening and increasing of the height of the existing underpasses of Washington Boulevard and the Harbor Branch Line and the main line railroads of The Atchison, Topeka & Santa Fe Railway Company, in accordance with the preferred plan of the City of Los Angeles as previously described herein. We further find that The Atchison, Topeka & Santa Fe Railway Company shall bear fifty per cent (50%) of the said amount of $569,355, the costs to be allocated, hereinabove indicated, and the City of Los Angeles the remainder." [R. 130.]

Appellant, petitioner below, made no contention that enlargement of the existing underpasses is not needed. The question presented to the California Supreme Court related solely to the allocation of costs. That the issue was so limited in the Court below by appellant was clearly and succinctly stated in the first paragraph of the conclusion of its reply to the answer of the respondent Public Utilities Commission and the answer of the respondent City of Los Angeles, as follows:

"The issue here is not whether the Washington Boulevard grade separation should be enlarged, but solely whether Petitioner, or any other railroad in a like situation, should pay a share of the cost far exceeding any possible, or even arguable, benefits it might receive." [R. 252.]

In fact, appellant freely admitted the dangerous nature of the existing underpasses, it being said in its points and authorities attached to its petition for writ of review that:

> "The narrowness of the underpass structures creates a hazard, particularly to large trucks which may scrape the sides of the structures and to trucks taller than the vertical clearance. It is admitted that the evidence is sufficient to support a finding that the underpasses should be enlarged. * * *
>
> "Admittedly the underpass structures have become inadequate for vehicular traffic on Washington Boulevard and because of faster traffic, more traffic, and larger, wider, and higher trucks there is danger that trucks may scrape the sides of the underpass structure, but the change in the use of highway and in the types of vehicles using it and faster traffic have created this danger, not the railway." [R. 35 and 46.]

In the face of these previously admitted facts how can appellant characterize this accident hazard as *de minimus*, or does it now claim that an accident hazard is completely absent in this case? (See Joint Br. for Appellant, p. 78.)

Appellant's Allocated Costs Are Only 35% of the Total Cost of the Improvement and Only 40.6% of the Added Cost Occasioned by the Presence of the Railroad Structures.

As to the proportion of the cost assessed against appellant for removal of its obstructions to the free and proper use of Washington Boulevard, it is incorrect to claim, as asserted at page 4 of appellants' joint brief, that the commission assessed against appellant "one-half of the cost (estimated at $569,335) of reconstructing and enlarging,

from two to six lanes, the existing grade separations at the point where Washington Boulevard intersects appellant's railroad line in the City of Los Angeles." The truth of the matter is that $569,355 was determined by the commission to be "the estimated costs of the proposed structures which may be said to be attributable to the presence of the railroad tracks for two divided span bridges." [R. 130.] The Commission stated that "The remaining costs are clearly attributable to the paving and widening of the street." [R. 130.] The evidence of the total estimated cost of what appellant describes as reconstructing and enlarging from two to six lanes, the existing grade separations is stated by the Commission to be $812,765. [R. 121.] One-half of $569,355 is only 35% of the total estimated cost. That the equity of the situation shows that the City is the one who has cause to complain, not the railroad, is clear from the statement of the Commission that:

> "Of the above amounts it was estimated that all of the cost of the bridges, walls and slopes, amounting to $575,105, and slightly more than one-third of the cost of the storm drain and street work, amounting to $125,910, or a total of $701,015, were costs necessitated by the presence of the railway. In other words, the cost to the City, if the railroad were not present, would be as follows:
>
> | | |
> |---|---|
> | Storm drain | $50,900 |
> | Street work | 48,660 |
> | Sewer | 10,350 |
> | Traffic safety devices | 1,840 |
> | | $111,750." [R. 122.] |

In short, for an estimated cost of $111,750 the desired and necessary improvement to Washington Boulevard could be made at the place in question, but because of the presence of the railroad, the estimated cost is $812,765 or an increase of $701,015 to the City, only $284,677.50 or 40.6% of which is to be borne by the railroad, leaving a net *cost to the City of $417,337.50 for the privilege of removing the existing structural facilities of the railroad within the street easement which obstruct the free and present necessary use of the city street.* And, incredulous as it may seem, appellant complains that it is being denied equal protection of the law, that its property is being taken without due process of law and for public use without just compensation and that interstate commerce will be subjected to an undue and unreasonable burden.

The factual statements recited in the opinion of the California Public Utilities Commission are not directly or specifically attacked by appellant. However, in order to bring to the attention of the Court so much of the proceedings before the Commission as appear in the record which clearly show the fairness of the Commission's opinion, there is attached to this brief, as an appendix thereto, a summary of matters before the Commission which amply supports the appraisal by that body of the real factual situation presented in this case and the issues it was called upon to decide.

Questions Presented.

It appears that the questions presented are as follows:

1. Is an order of a public utilities commission allocating costs for enlarging existing grade separation structures made after notice and hearing subject to attack either on appeal or by certiorari in the absence of the record made before the commission and upon which it acted?

2. If a railroad is forced to pay a substantial part of the cost of altering or enlarging its grade separation structures located within a street easement in order to remove the obstruction therein so as to permit the free and presently necessary use of the street for purposes of travel, must there appear to be a corresponding benefit to the railroad in its operations substantially commensurate with the amount the railroad it forced to pay in order to avoid

(a) Taking the railroad's property for public use without just compensation in violation of the due process clause of the Fourteenth Amendment;

(b) Depriving the railroad of its property without due process of law and denying it the equal protection of the law in violation of the Fourteenth Amendment;

(c) Imposing undue and unreasonable burdens upon interstate commerce in violation of the commerce clause contained in paragraph 3, Section 8, Article I of the Constitution of the United States or any paramount Federal statute?

Summary of Argument.

1. Since in a case of this nature the attack must be upon the order of the California Public Utilities Commission, the assignments of error on the part of the California Supreme Court in affirming the order do not present questions which may be decided on appeal from the judgment of that Court and the appeal should be dismissed. (*Live Oak Water Users Association v. Railroad Commission* (1926), 260 U. S. 354, 357.)

2. As the record made before the Commission upon which the order involved in this case is based is not before this Court, the order of the California Public Utilities Commission cannot be reviewed either on appeal or on certiorari because even if the order in its finality be considered as legislative-administrative in character, yet under the California constitutional provisions empowering the Commission to act, the ordained procedure by which this result is to be achieved is strictly judicial. (*Pacific Telephone and Telegraph Company v. Eshleman* (1913), 166 Cal. 640, 650, 137 Pac. 1119.)

3. Appellant's structures upon which its present overhead crossing is supported being located within an existing street easement and which are required to be eliminated in order to remove obstructions to the free use of the street easement by the public to the extent required under presently existing conditions, appellant has no property right therein which will support any claim of violation of either the due process or equal protection clauses

of the Fourteenth Amendment or undue burden upon interstate commeree.

4. Appellant asserts that "during the horse and buggy era" imposition upon the railroads of the full cost of construction of grade separations was upheld on the theory that the railroad was responsible for the danger to intermittent traffic and could be required under the state's police power to eliminate the danger incident to rail operations; but that there have been revolutionary changes in transportation in recent years, brought about by the widespread use of motor vehicles. Now, vehicular traffic is the chief beneficiary of grade separations, the modern purpose being the furtherance of uninterrupted rapid movement by motor vehicles, the railroad's principal competitor. Grade separations are now simply "public improvements" built for public benefit. Therefore, the railroads may not be compelled to contribute to the cost thereof in excess of an amount which represents a fair estimate of the benefits it will receive therefrom.

To the foregoing argument, this appellee replies:

(a) The danger to the increased vehicular traffic of today is just as great from railroad grade crossings as it was to the "horse and buggy" of the past and is now more wide spread because of the increased number of vehicles on the streets and highways, *a fortiori*, today, the reasonable exercise of the police power will still warrant the same imposition upon the railroad of the cost of grade separations as it did in the past.

(b) Whatever the reason for grade separations in other cases may be, in this case appellant is maintaining within the street easement owned by the City an obstruction upon which the railroad supports its existing overhead crossing structures across Washington Boulevard *necessary to the operation of the railroad* and which not only impedes vehicular traffic by providing only a twenty-foot opening with impaired clearance and without sidewalk facilities for pedestrians in a ninety-foot street easement in one of the heaviest industrial areas of the city, but creates an admitted hazard to the safe use of the street.

(c) The order of the Public Utilities Commission for the alteration of the existing grade separation is not a public improvement for the special benefit of any particular class of property or persons which would limit the allocation of the cost therefor to special benefit received, but is for the benefit of the general public. Further, it requires the railroad to pay only 35% of the total cost of the improvement, or 40.6% of the *added cost* to the City for the improvement, which would be absent if the railroad obstructions were not in the street easement at the present time.

ARGUMENT

A considerable portion of the argument in the joint brief for appellants has no particular application to the facts relating to the alteration of the railroad structures providing the overhead crossing on Washington Boulevard. Accordingly, those portions of appellant's argument are passed without comment in this brief. However, the absence of reply thereto is not to be taken as acquiescence therein or agreement therewith on the part of this appellee.

POINT I.

Appellant's Specification of Errors Based on the Judgment of the California Court Does Not Support an Appeal to the Supreme Court of the United States.

Appellant's specification of errors set forth on pages 12 and 13 of the joint brief for appellants is directed to an attack upon the judgment of the Supreme Court of California, it being asserted that the Court erred in failing to hold in the particulars noted. The question on appeal can only be whether the order of the Public Utilities Commission violates constitutional rights and immunities. The judgment of the Court below in failing to so hold is not the subject of attack on appeal to this Court.

In *Live Oak Water Users Association v. Railroad Commission* (1926), 269 U. S. 354, the Supreme Court of California affirmed an order of the California Railroad Commission (predecessor of the Public Utilities Com-

mission) fixing water rates and the case was brought before this Court on a writ of error. In dismissing the writ it was said at page 357:

> "The brief for plaintiffs in error declares: 'The plaintiffs in error maintain that by the judgment of the supreme court of California the obligations of their contracts have been impaired, that their property has been taken without due process of law, that they have been denied the equal protection of the laws, and that the California court has denied and renounced its power to protect the plaintiffs in error in their claims of rights, privileges and immunities secured by the Constitution of the United States.' This statement shows no jurisdiction here under the writ of error although it specifies a Federal question justiciable by certiorari. Something more than a claim of Federal right is necessary; the attack must be upon the validity of the order, not merely upon the court's judgment."

In the case at bar appellant freely admits its existing structures constitute a hazard to the traveling public making use of the street. It does not question the authority of the California Public Utilities Commission to entertain an application for the elimination of this hazard and to order alteration and enlargement of the structures needed for appellant's overhead crossing of the street. All that appellant is complaining about is the proportion of the costs allocated to it, claiming that it is violative of the due process and equal protection guaranteed by the Fourteenth Amendment and unduly burdens interstate commerce. In short, appellant is not attacking the validity of a statute, if it be a statute, appellant is setting up a claimed right, privilege or immunity under the Constitution of the United States. Is this not a matter to

be reviewed by certiorari under paragraph (3) of section 1257 of Title 28, United States Code, and not under paragraph (2) of that section, by appeal? Certiorari appears to be the proper method of review under the circumstances, and not by appeal. (*Dana v. Dana* (1919), 250 U. S. 220, 222.)

POINT II.

The Record Before This Court Does Not Permit a Review of the Order of the Commission on Certiorari.

Appellant contends that "even if it were to be assumed that the certiorari route should have been followed, the Court would treat the appeal papers in these cases as petitions for writs of certiorari," citing Title 28, United States Code, section 2103. (Joint Br. for Appellants, p. 80.) But, how can the papers on appeal be treated as a petition for certiorari if insufficient for that purpose. The difficulty with this suggestion is that the record made at the hearing before the commission and upon which the order complained of is based is not before this Court. Unlike a statute or ordinance adopted by a legislative body, the order of the Public Utilities Commission was by compulsion of the California Constitution, the result of a strictly judicial hearing.

As stated in *Pacific Telephone and Telegraph Company v. Eshleman* (1913), 166 Cal. 640, 650, 137 Pac. 1119, 1122:

> ". . . While without quoting, a reading of sections 22 and 23 of Article XII of the constitution and of sections 53 to 81 of the Public Utilities Act will establish beyond doubt that the railroad com-

mission is empowered to sit, and in the performance of its most important duties must sit, as a tribunal exercising judicial functions of great moment. It may be said that the final order of the commission in many instances is legislative-administrative in character, but none the less the ordained procedure by which this result is to be reached, the determination of controverted facts between private litigants and disputants, and the decision upon these controverted matters, are strictly judicial. (*Robinson v. Sacramento*, 16 Cal. 208; *Imperial Water Co. v. Board of Supervisors*, 162 Cal. 14 [120 Pac. 780].)"

The same thought was expressed in *City of San Jose v. Railroad Commission* (1917), 175 Cal. 284, 165 Pac. 967. In answer to the city's contention that the Public Utilities Act did not in terms provide for service of process or notice or that the city's rights be examined at any hearing, it was there said at pages 290 and 291 (Pac. p. 969):

". . . We do not regard the omission to provide definite process to bring the city before the commission at a hearing on the necessity for a safe crossing as being fatal to the acquirement of jurisdiction over the municipality by the commission. The latter is both a court and an administrative tribunal. As a judicial body it has by implication all the powers necessary for the exercise of its duty. The city of San Jose does not complain that it had no day in court. It had notice to appear; actually did appear and was heard upon issue joined and evidence pro-

duced; and it had opportunity for review of the judgment. But aside from the power to summon and hear parties in interest—one which is necessarily involved in the judicial authority enjoyed by the commission, section 53 of the Public Utilities Act confers upon it power to prescribe rules of practice and procedure."

It being "now settled that a utility has no right to relitigate factual questions on the ground that constitutional rights are involved" (*Alabama Public Service Com. v. Southern Railway Co.* (1951), 341 U. S. 341, 348), appellant cannot be heard to relitigate before this Court its contentions upon so much of the record made before the Public Utilities Commission as may be included in the appeal papers. Moreover, as this appellee views the question before this Court, it is not whether the *Commission* correctly weighed the evidence or correctly or incorrectly arrived at its decision, but, rather, whether *upon the facts before it,* its order violates any constitutional rights of appellant. How can a determination be made that such is the case without a review of the record before the commission? As far as the portions of the record which appellant submitted to the California Supreme Court are concerned, there was ample ground for sustaining the action of the commission, and, therefore, there was nothing for that Court to do but affirm the order of the commission.

POINT III.

Appellant May Not Rely Upon the Face of the Public Utilities Commission Order as Showing Impairment of Appellant's Asserted Constitutional Rights, as Its Validity Depends Upon the Facts of the Particular Case.

If appellant contends that the face of the opinion and decision of the California Public Utilities Commission furnishes sufficient ground for determining that the allocation of costs is unreasonable and therefore void, such contention is contrary to *Nashville, Chattanooga & St. Louis Railway v. Walters* (1935), 294 U. S. 405, the case upon which appellant so strongly relies. There, this Court noted a long list of decisions supporting the conceded premise of appellant therein that (p. 413):

> ". . . the rule has long been settled that, ordinarily, the State may, under its police power, impose upon a railroad the whole cost of eliminating a grade crossing, or such part thereof, as it deems appropriate."

This Court also pointed out that (p. 429):

> "It is true that the police power embraces regulations designed to promote public convenience or the general welfare, and not merely those in the interest of public health, safety and morals."

And further pointed out that (p. 430):

> "It is also true that state action imposing upon a railroad the cost of eliminating a dangerous grade crossing of an existing street may be valid although

it appears that the improvement benefits commercial highway users who make no contribution toward its cost. *Chicago, B. & Q. R. Co. v. Nebraska*, 170 U. S. 57, 75, 42 L. ed. 948, 954, 18 S. Ct. 513; *Missouri P. R. Co. v. Omaha*, 235 U. S. 121, 59 L. ed. 157, 35 S. Ct. 82, that a railroad has no constitutional immunity from having to contribute to the cost of safeguarding a crossing with another railway line, merely because the first railroad was built before the crossing was made; *Detroit, F. W. & B. I. R. Co. v. Osborn*, 189 U. S. 383, 47 L. ed. 860, 23 S. Ct. 540; *Northern P. R. Co. v. Puget Sound & W. H. R. Co.*, 250 U. S. 332, 63 L. ed. 1013, 39 S. Ct. 474, and that the State may, under some circumstances, impose upon a railroad the cost of the grade separation for a new highway. But in every case in which this Court has sustained the imposition, the new highway was an incident of the growth or development of the municipality in which it was located. *Northern P. R. Co. v. Minnesota*, 208 U. S. 583, 592, 52 L. ed. 630, 634, 28 S. Ct. 341; *Cincinnati, I. & W. R. Co. v. Connersville*, 218 U. S. 336, 54 L. ed. 1060, 31 S. Ct. 43, 20 Ann. Cas. 1206; *Chicago M. & St. P. R. Co. v. Minneapolis*, 232 U. S. 430, 58 L. ed. 671, 34 S. Ct. 400; *Erie R. Co. v. Public Utility Comrs.*, 254 U. S. 394, 409, 65 L. ed. 322, 333, 41 S. Ct. 169, P. U. R. 1921C, 143. Compare *Atlantic Coast Line R. Co. v. Goldsboro*, 232 U. S. 548, 554, 58 L. ed. 721, 725, 34 S. Ct. 364. And in every such case the municipality apparently bore the cost of constructing the new highway for which grade separation was required."

Comparing the face of the Commission's opinion on rehearing and its decision with clearly recognized instances, mentioned in the foregoing case, in which a railroad may be compelled to do far more than appellant is ordered to do in the instant case, it follows that if any invalidity is involved it must be solely by virtue of the *facts* of the case upon which the Commission's order was based.

The facts upon which the order complained of is based were fully presented to the Public Utilities Commission upon a judicial hearing, and the Supreme Court by denial of appellant's petition for writ of review in effect affirmed the order upon the merits as stated by appellant at page 2, footnote 1, of the joint brief for appellants, to which may be added, citation of the case of *Southern California Edison Co. v. Railroad Commission* (1936), 6 Cal. 2d 737, 59 P. 2d 1277. The affirmance by the Supreme Court of California being upon so much of the record before the Public Utilities Commission as appellant chose to submit in support of its petition plus, possibly, "the special knowledge of local conditions possessed by the State tribunals" which this Court in the *Nashville* case recognized "may be of great weight" (204 U. S. at p. 433), how can this Court review the order made by the commission to determine whether the facts adduced at the judicial hearing before the commission do not support the order, the record of the hearing before the commission being absent?

In concluding discussion of procedural problems a word seems appropriate in reply to appellant's assertion at pages 82 and 83 of appellants' joint brief that an attack upon the propriety of the allocation of costs involves a statute as far as jurisdiction of this Court *on appeal* is concerned. Appellant claims that "the very question here raised by the appellee cities was answered by this Court" in *Grand Trunk Western Ry. Co. v. Railroad Commission* (1911), 221 U. S. 400. This does not appear to be the fact. In the case cited, the question was whether the commission's order was a law of the state within the constitutional prohibition against the impairment of contracts, not whether the jurisdiction of this Court was properly invoked on appeal. That question does not appear to have been raised in the case.

Where the question raised is whether the impairment of the contract is by a law of the state, the question is whether the effect of official action is *equivalent to a statute of the state.* (*Appleby v. Delaney* (1926), 271 U. S. 403, 409.) While not ordinarily so, even the judgment of a state court may, under some circumstances, be construed as a law of the state in determining if contract rights have been impaired. (See *Columbia Ry. Gas & Electric Co. v. South Carolina* (1923), 261 U. S. 236, 244.)

POINT IV.

Appellant's Structures Being Within the Street Easement Appellant Has No Property Right in the Continued Maintenance of Such Structures Which Will Support a Constitutional Right to Compensation for Their Necessary Removal or Relocation in the Public Interest.

The street easement in which appellant's structures supporting its present overhead rail crossing is located was acquired by the City of Los Angeles by condemnation and by negotiation. [R. 152.] *Appellant does not assert that it has any vested property right, reserved by deed or judgment, superior to that of the City's easement for street purposes.* Appellant has not asserted what the nature of its claimed property right is that requires appellant to be compensated for the enforced removal of its structures from the street easement in the public interest. At most appellant can only be the holder of some type of franchise which permits it to make a secondary use of the street easement for location of its permanent structures therein.

It has long been the law, and so declared by this Court subsequent to its decision in the *Nashville* case, that the holder of a franchise or easement for public utility structures in a street must remove or relocate the same without compensation when reasonably necessary for the needed public primary use of the street.

The rule, its long standing, and its limitations even as to acquired easements, were discussed in *Panhandle Eastern Pipe Line Co. v. State Highway Com.* (1935), 294 U. S. 613, decided April 1, 1935, less than a month after the *Nashville* case. Unlike appellant in the case

at bar, the *Panhandle Eastern Pipe Line Company* had previously acquired easements from private land owners *which were not acquired* by the highway commission for the contemplated highway improvement consisting of new highways crossing the pipe line right of way at six widely separated places. "Plans for the new highways called for material changes in the pipe and telephone lines at the crossings—removals, lowerings, easements—estimated to cost above $5,000" (p. 616). The Kansas Highway Commission ordered the changes to be made and, upon the company's refusal without payment therefor, secured a writ of mandate compelling performance of the order without compensation. On appeal to this Court appellant challenged the validity of the statute upon the authority of which the commission's order was made. In reversing the judgment of the Supreme Court of Kansas, this Court pointed out that "a private right of way is an easement and is land" which ordinarily cannot be taken without compensation (p. 618). And, in the course of differentiating between pipe lines beneath a street and railroad crossings specifically stated *without a qualification existing by reason of the Nashville case* (pp. 620, 621):

> " 'The company must be deemed to have laid its tracks within the corporate limits of the city subject to the condition—not, it is true, expressed, but necessarily implied—that new streets of the city might be opened and extended from time to time across its tracks as the public convenience required, and under such restrictions as might be prescribed by statute . . . The plaintiff in error took its charter subject to the power of the State to provide for the safety of the public, in so far as the safety of the lives and persons of the people were in-

volved in the operation of the railroad. The company laid its tracks subject to the condition necessarily implied that their use could be so regulated by competent authority as to insure the public safety.' *Chicago, B. & Q. R. Co. v. Chicago,* 166 U. S. 226, 250, 252, 41 L. ed. 979, 989, 990, 17 S. Ct. 581.

" 'The railway company accepted its franchise from the state, subject necessarily to the condition that it would conform at its own expense to any regulations not arbitrary in their character, as to the opening or use of streets, which had for their object the safety of the public, or the promotion of the public convenience, and which might, from time to time, be established by the municipality, when proceeding under legislative authority—within whose limits the company's business was conducted.' *Cincinnati, I. & W. R. Co. v. Connersville,* 218 U. S. 336, 343, 54 L. ed. 1060, 1064, 31 S. Ct. 93, 20 Ann. Cas. 1206; *Chicago, M. & St. P. R. Co. v. Minneapolis,* 232 U. S. 430, 440, 58 L. ed. 671, 675, 34 S. Ct. 400.

"*Erie R. Co. v. Public Utility Comrs.,* 254 U. S. 394, 65 L. ed. 322, 41 S. Ct. 169, P. U. R. 1921C, 143, *supra,* opinion by Mr. Justice Holmes, goes upon the theory that it could be reasonably said that public safety required the changes, and that the order of the Commission 'should be regarded as stating a condition that must be complied with if the company continues to use' the soil. Also, 'the authority of the railroads to project their moving masses across thoroughfares must be taken to be subject to the implied limitation that it may be cut down whenever and so far as the safety of the public requires.'

* * * * * * * *

"The rule in respect of railroad crossings applies when there is substantial risk of injury to the

public from the operation of trains, and ground to imply the company's consent to take such measures as may be necessary to prevent the hazard. This Court has not sanctioned extension of the rule to wholly dissimilar circumstances; it does not apply to structures which are unattended by serious danger to the public."

The further qualification expressed in the *Panhandle Eastern* case (p. 621) upon authority of *Pennsylvania Coal Co. v. Mahon,* 260 U. S. 393, that:

> "The rights of the public in a street purchased or laid out by eminent domain are those that it has paid for. If in any case its representatives have been so short sighted as to acquire surface rights without right of support we see no more authority for supplying the latter without compensation than there was for taking the right of way in the first place and refusing to pay for it because the public wanted it very much,"

has no application to this case as appellant is not contending that it has any property right by deed or judgment to which the City's title for street purposes is subject or subordinate.

Moreover, on a straight franchise right basis, the rule as to removal of structures without compensation when necessary in the public interest as originally announced in *New Orleans Gaslight Co. v. Drainage Commission,* 197 U. S. 453, is held in the *Panhandle* case (p. 622), to still be the rule, despite the *Nashville* case.

It follows therefore that, under the facts of the case at bar, it does not appear that appellant has any property right involved upon which it can predicate an assertion of the protection of the Constitution of the United States.

POINT V.

The Danger to the Traveling Public on the Highway Today Is Just as Great as It Was at the Railroad Grade Crossing "During the Horse and Buggy Era" and More People Are Exposed to Such Danger Than in the Past.

Appellant at page 32 of the joint brief for appellants under the subtitle, in quotes, "The Revolutionary Changes Incident to Transportation Wrought in Recent Years by the Introduction of Motor Vehicles" states:

> "The 'horse and buggy' days are receding rapidly from the memories of men into the pages of history. But to those who remember the days when the automobile was a new and rare object, the changes brought about by the automobile, the truck and the bus are awe-inspiring."

Appellant then refers to the superiority of rail transportation in those days and states (p. 32):

> "It was upon the 'particular facts' pertinent to this era that this Court upheld state action requiring the railroads to pay the entire cost of building grade separations."

But what were the "particular facts" pertinent to that era? Appellant states at page 51 of the joint brief:

> "The fact that the accident hazard was the source of almost all agitation for separation of grades in the years preceding the 'transportation revolution,' and was the principal basis for assessing the cost against the railroad which created that danger, is clearly shown by the decisions of this Court and the courts of the several states approving such assessments."

How can it be argued that today the hazard has been diminished? Appellant at page 56 of the joint brief of appellants lists some eight asserted principal causes of grade crossing accidents, which, except for possibly substituting the mechanical warning device for the former flag man and the faulty car stalling on the track instead of the balky or frightened horse, are the same today as in the past.

To say, as appellant asserts at page 57 of the joint brief, that the intersection of a railroad line and a highway is no different from the point of view of safety, from the intersection of two highways is absurd.

What railroad can control its operations in conformity with traffic signals governing the movement of vehicular traffic on a highway? If there be one, it can have no bearing in this case because according to appellant's own witness before the Public Utilities Commission *a main line railroad could not operate under signalised or synchronised control of traffic, such as that under which vehicular traffic operates.* [R. 154.]

What appellant is really arguing is that it no longer enjoys a virtual monopoly in transportation and that therefore it should not be forced to stand any portion of the cost of making its crossings safe because it will benefit its competitors. But what right has the railroad to make a highway *unsafe* for its competitors or any other segment of the public? That is the real crux of appellant's argument and the premise upon which it is really premised. That it has no such right is self-evident and the fallacy of appellant's argument based upon this false assumption needs no comment. Safety to the public, today, as in the past, fully warrants the order of the California Public Utilities Commission complained of by appellant in the case at bar.

POINT VI.

Whatever the Reason for Grade Separations in Other Cases May Be, in This Case Appellant Is Maintaining Within the Street Easement Owned by the City an Obstruction Upon Which the Railroad Supports Its Existing Overhead Crossing Structures Across Washington Boulevard Which Not Only Impedes Vehicular Traffic by Providing Only a Twenty-foot Opening With Impaired Clearance and Without Sidewalk Facilities for Pedestrians in a Ninety-foot Street Easement in One of the Heaviest Industrial Areas of the City, but Creates an Admitted Hazard to the Safe Use of the Street, the Removal of Which Will Be of Substantial Benefit to All Segments of the Public.

Disregarding the facts of any other case, it appears from the available portions of the hearing before the California Public Utilities Commission, as established by appellant's own witnesses, the following:

> "Arthur C. Jenkins, protestant's witness, qualified as a consulting engineer with many years' experience in various phases of transportation problems." [R. 20.] * * *
>
> "Mr. Jenkins recognized that the railroads receive an advantage where the hazard to the train is eliminated by separation of grades; * * * that the railroads receive benefits from eliminating grade separations by eliminating delays; * * *
>
> "That railroads should be given priority at grade crossings because highway traffic is continuous whereas railroad operation is relatively infrequent, and because railroads would block more than one intersection if stops were made for traffic signals, and trains are too heavy to accelerate rapidly to

clear traffic signals following a complete stop." [R. 26.]

"That if the City put in a grade crossing over the tracks at Washington Boulevard, the Santa Fe would suffer a detriment, since a grade crossing presents a hazard—regardless of the type of protective devices there; that motor vehicles may crash even through automatic gates, which are the best type of protection; but the situation as it presently exists is no detriment to the railroad, because the grades are separated now;" [R. 28.]

"Frank H. Hitchcock, a witness for Santa Fe and the General Claims Agent at Los Angeles, testified that:" [R. 29.] * * *

"The hazard of damage to trains has increased many fold in recent years. Years ago trains seldom struck anything but a horse and buggy and pedestrians. Now tank trucks and heavy vehicles cause disastrous wrecks and derailments primarily due to the increased size and width and character of highway vehicles." [R. 30.] * * *

"The average accident with an automobile does not damage railroad equipment. Accidents with trucks, road rolling machines, and commercial-type vehicles do cause damage to railroad equipment." [R. 30.]

"O. L. Gray, General Manager for Santa Fe, testified that there are seventeen scheduled passenger train movements and sixteen to twenty-two freight train movements daily over Washington Boulevard." [R. 30.] * * *

"Freight trains over Washington vary in content from ten to one hundred cars. Their speed does not exceed fifteen miles per hour.

"There has been substantial increase in business in this area since 1900 freightwise but not passengerwise. Including military trains, Santa Fe trains carry 1,000 to 1,200 persons daily over Washington Boulevard.

"Crossing accidents cause considerable expense and delay. For example at Azusa a gasoline truck collided with the Super Chief doing approximately $150,000.00 damage including claim costs, and delayed the train about two hours.

"One crossing accident out of twenty-five or thirty may damage a train, the damage usually consisting of damage to foot boards or handholds or ladders. A small proportion of the accidents cause damage to other equipment. Perhaps one out of fifty or sixty accidents may cause a derailment." [R. 31.]

Mr. Jenkins, the Company witness, admitted that "there is no escaping that fact that railroad crossings constitute a hazard to life and property at the present time," and he also testified that "under present traffic conditions street traffic presents a hazard to trains, which was 'extremely serious,' and that the elimination of such hazard was an advantage to the train." Mr. Jenkins further testified that in computing benefits to the railroad resulting from grade separations, the delay factor should be given considerable weight and that a main line railroad could not operate under signalized or synchronized control of traffic, such as that under which vehicular traffic operates. [R. 153-154.]

Mr. Jenkins also testified that "there were heavy industries in the area here involved, and that there was local traffic from such industries using Washington Boulevard. Likewise he admitted that probably 100 percent

of all passenger traffic handled by railroads use city streets at some stage of their journey, so that city streets are feeders and used as feeders for the railroad business, and that a comparable situation largely exists with respect to freight, except that there is a larger percentage of freight served directly by spurs which do not involve truck connection." [R. 154.]

He likewise admitted that "the mere presence of a truck doesn't prove competition with a railroad, but instead the truck might be feeding the railroad, rather than competing with it." [R. 154.] He further admitted that "a crossing at grade would be a detriment to the railroad." [R. 154.]

Mr. Grey, another company witness, testified that "since 1900 there has been a very substantial increase in the business done by the Santa Fe, freightwise, over the lines using the tracks here involved; that where there is a series of tracks such as here involved, and assuming an automobile and train collision, there would be considerable expense and delay and disruption of scheduling, which would not be reflected in claim payments; that in some accidents considerable damage is done to the Santa Fe equipment, such as when a truck collided with the Super Chief, damaging Santa Fe equipment about $150,000 and relaying the train about two hours; that a serious delay influences movement of traffic in either direction, not only at the point of the accident but further on down the line; that the tonnage now handled over these tracks is up, even greater than in 1928 or 1929 when volume was very heavy; that the San Diego line, which uses these tracks, is a very good passenger earner; that the diesel locomotives now being used handle longer trains with more tonnage, which is a benefit to the railroad, and

the longer the train the better for the railroad, regardless of the fact that such longer trains would block grade crossings for a longer period of time." [R. 155.]

Taking this evidence in connection with the factual situation described in the opinion of the Public Utilities Commission, as heretofore set forth in the Statement of the Case, what more is needed to show the need for the alteration of the existing railroad structures across Washington Boulevard and the propriety of assessing at least a portion of the cost thereof to appellant?

On the facts presented before the Public Utilities Commission in the case at bar the decision of the Supreme Court of Illinois in *Chicago Junction Railway Co. v. Illinois Commerce Commission* (1952), 412 Ill. 579, 107 N. E. 2d 758, appears to amply support the Commission's order in this case and is a clear exposition of the proper application of the legal principles involved to modern conditions.

There, an order of the Illinois Commerce Commission, ordering the construction of a new overhead railroad crossing and apportioning the costs thereof, was affirmed in the light of the following facts stated in the opinion (p. 760):

> "The pertinent facts which were disclosed at the hearing showed that Ashland Avenue is a north and south public street in the city of Chicago, which has been widened from its original 80 feet to 100 feet for some nineteen miles, and the petition herein sought to eliminate one of the remaining narrow points in the street. The present forty-year-old bridge, which crosses Ashland Avenue between Thirty-ninth and Forty-first Streets, constricts the streets usable

width to some 64 feet, which is further narrowed to 44 feet at the actual point of passage under the bridge. * * * Ashland Avenue is designated as an interstate trucking route, and near the bridge in question there is a congested industrial and commercial area to and from which a great deal of traffic flows. Some 500 trains move over the bridge every day, and a traffic count on June 15, 1949, showed that more than 21,000 vehicles passed under the bridge in a 16-hour period. * * *

"Following the hearing, the commission found that the bridge in existence severely constricted the usable width of Ashland Avenue; that it was not sufficiently strong to support weights of trains which reasonably should use it; that public convenience and safety required its removal and replacement by a structure built to modern standards which would provide reasonable and adequate facilities for both highway and railroad purposes. The commission thereupon ordered that the cost of the replacement structure be paid 65 per cent by the petitioner, and 35 per cent by the railroads."

On a factual basis, it would be difficult to find better judicial authority, expressed in the light of modern conditions, so fully supporting the order of the California Public Utilities Commission made in the case at bar. As a Court having long experience with the problem, the decision of the Supreme Court of Illinois is certainly entitled to great weight. And, the foregoing case is a clear expression of judicial repudiation of the contentions of appellant relative to the *Nashville* case establishing a new principle applicable to situations similar to that involved in the case at bar.

POINT VII.

The Order of the Public Utilities Commission Is Not Repugnant to the Commerce Clause of the Constitution of the United States or Any Statute Enacted Under the Authority Thereof.

As stated by this Court in *Railway Express Agency v. New York* (1949), 336 U. S. 106, 112:

> "Where traffic control and the use of highways are involved and where there is no conflicting federal regulation, great leeway is allowed local authorities, even though the local regulation materially interferes with interstate commerce."

From what has heretofore been pointed out in this brief, the order of the Public Utilities Commission is not subject to attack upon the ground that it offends against the commerce clause as it "makes no discrimination against interstate commerce, will not impede its movement in regular course, and will affect it only incidentally and indirectly." (*Denver & Rio Grande Railroad Co. v. City and County of Denver* (1919), 250 U. S. 241, 246.)

Appellant's reliance upon asserted congressional declaration of policy affords no ground for attack upon the order. There is nothing in such declaration attempting to strike down the exercise by the states of the power here involved. As stated in *Southern Pacific Co. v. Arizona* (1945), 325 U. S. 761, 766:

> "The provisions under which the Commission purported to act, phrased in broad and general language, do not in terms deal with that subject. We do not gain either from their words or from the legislative history any hint that Congress in enacting them intended, apart from Commission action, to supersede

state laws regulating train lengths. We can hardly suppose that Congress, merely by conferring authority on the Commission to regulate car service in an 'emergency,' intended to restrict the exercise, otherwise lawful, of state power to regulate train lengths before the Commission finds an 'emergency' to exist.

"Congress, in enacting legislation within its constitutional authority over interstate commerce, will not be deemed to have intended to strike down a state statute designed to protect the health and safety of the public unless its purpose to do so is clearly manifested, . . . or unless the state law, in terms or in its practical administration, conflicts with the Act of Congress, or plainly and palpably infringes its policy."

Conclusion.

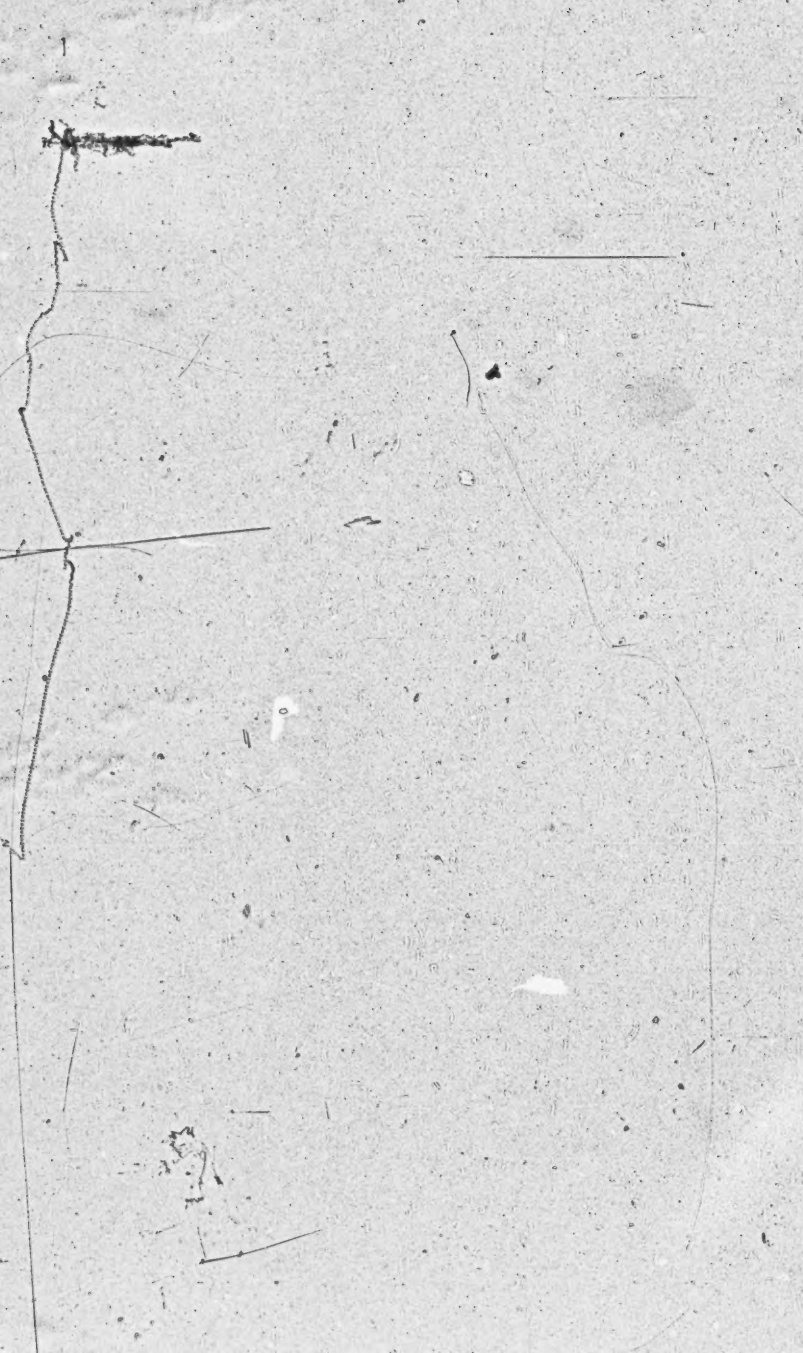
In conclusion, it is respectfully submitted that the appeal should be dismissed and certiorari be denied, or the judgment of the Supreme Court of California be affirmed.

Respectfully submitted,

ROGER ARNEBERGH,
City Attorney,

BOURKE JONES,
Assistant City Attorney,

Counsel for Appellee, City of Los Angeles.



APPENDIX.

Summary of Proceedings and Matter Before California Public Utilities Commission Which Sustain Its Order.

The petition for Writ of Review filed by appellant in the California Supreme Court and appendices thereto [R. 1-33] discloses that:

The Public Utilities Commission of the State of California, "was and now is an administrative and quasi-judicial tribunal." [R. 1.] "After public hearing and submission of points and authorities, the Commission, by its Decision No. 43374, dated October 4, 1949, authorized the City to enlarge the underpasses, further providing that the expense thereof was to be borne by the City, with the exception of the sum of $95,160.00 which was to be paid by the Santa Fe." [R. 2.] "Thereafter a rehearing was granted March 28, 1950, and public hearings were held thereon, followed by submission of points and authorities, and, on November 28, 1951, by oral argument before the Commission *en banc.*" [R. 2.] "On June 24, 1952, the Commission rendered its Decision No. 47344, the decision complained of." [R. 2.]

The nature and location of the underpasses and their history are alleged in Paragraph IV of the petition [R. 3] as follows:

"That the two underpasses herein concerned are located under the Santa Fe at Washington Boulevard, a principal East-West arterial highway across the City of Los Angeles, between Soto Street and Santa Fe Avenue. The railroad above the underpasses is near a junction of the Santa Fe's harbor line, consisting of a right-of-way

66 feet wide which was placed in operation on September 23, 1887; and one of Santa Fe's main lines to the East, consisting of a right-of-way 100 feet wide which was placed in operation on November 24, 1888.

"Prior to 1914, three tracks of the Santa Fe crossed the area now known as Washington Boulevard, at grade. There was no open street at or near the underpasses in the present location of Washington Boulevard. In 1914, pursuant to a contract between the City and Santa Fe, the two presently existing underpass structures, each 20 feet wide, approximately 200 feet apart, were constructed to give the City's garbage trucks easier access to a garbage disposal plant located east of the tracks. The City and Santa Fe by agreement each paid one-half of the costs thereof.

"Subsequent to the building of the railroad tracks the City acquired easements for street purposes, partly from Santa Fe, and in 1931 constructed a bridge across the Los Angeles River a short distance easterly of the underpasses, and opened up Washington Boulevard as an arterial street from the Pacific Ocean on the west to Whittier Boulevard, east of the City. In 1926, Santa Fe required for railroad purposes, and built at its sole expense, an additional super-structure and track to provide a second main line track. Thus each bridge over Washington Boulevard now carries two tracks."

Appendix "B" to the petition [R. 10-33] is represented to be "a summary of the voluminous record in this matter, consisting of a summary of the pertinent pleadings, testimony and exhibits." [R. 10.] In that portion designated as "Summary of Pleadings" it is

recited in part that the application of the City filed June 8. 1948, alleges,

"* * * that Washington Boulevard is a public street extending from the Pacific Ocean near Venice, Easterly, through the entire breadth of the City for a distance of several miles East of the City to Whittier Boulevard, traversing the principal industrial district of the Los Angeles Metropolitan Area; that if its usefulness were not impaired by the narrowness and limited vertical clearance of its underpasses, it could and would be one of the principal carriers of traffic to, from and within the industrial district. * * *

"That in 1914 there was very little motor traffic in the area, but since that time the City has grown immensely and the motor vehicle traffic, including commercial trucking, has increased enormously; and that the industrial district nearby has become one of the great industrial districts of the nation;

"That the underpasses, because of their narrowness and inadequate vertical clearance, constitute a hazardous impediment to traffic, and have caused many serious accidents and traffic congestions; that large commercial trucks can pass only at peril of sideswiping;

"That there is no bus transportation, although there is a public demand for it, because of the limitations of the underpasses; that persons who work in the area must travel by circuitous routes;

"That because of congestion, many motor vehicles, and particularly large trucks which would normally use Washington Boulevard, are diverted to other streets, resulting in loss of man and vehicle hours and increased expense of transportation;

"That for the above reasons, the public need, safety, welfare and convenience require that the underpasses be enlarged, and their height be increased." [R. 10-11.]

It is significant to note that appellant's summary of its answer does not dispute the foregoing allegations of the City's application. The gist of appellant's answer, as summarized at pages 11 and 12 of the Record, is that any need for wider structures is solely because of increase in vehicular traffic and not because of a need on the part of the railroad and that the cost of enlarging the existing underpasses should be borne by the City as no benefit will accrue to the railroad, but will compel it to defray the cost of maintaining larger bridges.

It is also to be noted that no claim of any right protected by either Federal or State Constitutions was asserted in appellant's answer filed with the Public Utilities Commission.

As recited in the opinion of the Public Utilities Commission rendered after the rehearing, the parties stipulated to the effect "that all evidence in the prior hearings in this matter, leading to Decision No. 43374, *supra*, be incorporated in this record." [R. 117.] This is the foundation for appellant's "Summary of the Evidence Taken At the Original Hearing and Considered as Part of the Evidence on the Rehearing by Stipulation Between the Parties," included in Appendix "B" to the petition for writ of review commencing on page 13 of the record. Under this portion of Appendix "B" to the petition it appears that:

H. F. Holley, applicant's witness, Assistant Chief Engineer of the Automobile Club of Southern California, testified that the need for the enlarged underpasses was

the result of increased vehicular traffic and that there is a tremendous flow of traffic on Washington Boulevard. [R. 13.] Howard P. Mason, applicant's witness and Secretary of the Metropolitan Traffic & Transit Committee of the Los Angeles Chamber of Commerce, testified to the increase in population and vehicle registration in Los Angeles. [R. 13.]

Ralph T. Dorsey, applicant's witness and Principal Traffic Engineer of the City, testified that "Exhibit 2 showed the amount of traffic using streets in the vicinity of the grade separations, the directional volume of such traffic, and the left and right turns made by the traffic."

He stated that "the existing underpasses are potentially and actually a hazardous condition"; he submitted "Exhibits 3 to 7, inclusive, depicting insufficient vertical clearance and inadequate horizontal clearance; that there is a record of some accidents there; traffic conditions would be relieved throughout the area by an adequate underpass." He recommended "the construction of a 3-lane underpass each way, each lane 11 feet wide, and at least one sidewalk."

Mr. Dorsey further testified that "a public benefit would result from widening the underpasses, for the reason that traffic would continue with less delay and that Washington Boulevard could be used as a feeder for new freeways; thus relieving parallel streets of a considerable burden; that a crosstown busline would be one of many public benefits, reducing traffic since the public would use a bus instead of their own automobiles; thus reducing hazards by reducing the number of automobiles used." [R. 14.]

K. Charles Bean, applicant's witness and Chief Engineer and General Manager of the Department of Public Utilities & Transportation of the City of Los Angeles, testified that "as long ago as 1939 it was recommended that a busline be inaugurated on East Washington Boulevard; that the Los Angeles Railway Company felt that such a line could not be of maximum benefit until there was a better way of crossing the Santa Fe, the existing underpasses being inadequate and constituting an unreasonable hazard for the operation of a busline—studies indicated sufficient patronage, and such a service would help other lines relieve congestion downtown, but could not operate successfully because of too much delay." [R. 14-15.]

Milton Breivogel, applicant's witness and Principal City Planner of the City, described the industrial area in the vicinity of East Washington Boulevard; he also testified concerning population and vehicle registration increases, giving the number of persons residing within a five and a ten mile radius of the underpass.

According to this witness, "all streets today are loaded with traffic, and more street capacity must be provided for vehicles, especially in the area involved, where public transportation would become increasingly important." [R. 14-15.]

Hugo H. Winter, recalled by applicant, testified that "it is feasible to widen the Los Angeles River bridge at moderate expense"; he recommended "construction of underpasses wider than 56 feet"; he described Washington Boulevard "as one of the very important traffic-carrying arteries leading across the City and into the County; traffic lanes of 9 feet are not now considered adequate; that 10 feet is a suitable minimum, especially on a high-

way like Washington Boulevard where there is a relatively heavy flow of truck traffic; that two roadways of 33 feet width are recommended; that the reason 9 foot lanes are insufficient is because cars and trucks have increased in width, and must take into account that they now travel faster; that it is proper to provide for pedestrian use of the street, although there are no sidewalks now existing between Santa Fe Avenue and Soto Street in Washington Boulevard." [R. 16.]

"* * * that City officials agreed that Washington Boulevard is one of the City's very important east-west thoroughfares, it carries tremendous traffic as far east as Alameda Street where it is improved; that east of Alameda Street there is a large open pit which prevents complete improvement on the permanent lines of the boulevard; that between Santa Fe Avenue and Soto Street are the narrow railroad Santa Fe underpasses which prevent the complete improvement of Washington Boulevard in that section; that there is a tremendous diversion of traffic between Alameda Street and Soto Street because of the inadequacy of the existing roadways in both sections." [R. 17.]

He testified that "trucks and mixed traffic make necessary the construction of wider traffic lanes; that the *prima facie* speed limit on Washington near the underpasses is 25 miles per hour; that the need for higher vertical clearances arises solely because of the height of trucks; that the existing underpass structures became inadequate when Washington Boulevard bridge was built across the river in 1931; that before Washington Boulevard was made a through street it simply handled traffic in and out of the garbage disposal plant and the City's maintenance yard; that when the City built the bridge

across the river there was a pressing need of opening up Washington Boulevard between Santa Fe Avenue and Soto Street, so that it could become a link in not only a cross-city but, also, a cross-county highway that was rapidly being developed."

Mr. Winter stated that "there is a provision being made to connect Washington Boulevard at Telegraph Road with the Santa Ana Freeway that is being constructed; that the delay factor is one of the large factors in establishing the need of these grade separations; that from the standpoint of benefit, the widening of the underpasses would furnish more traffic capacity, which is now diverted to other streets; that 10-foot traffic lanes are satisfactory except where there are curves or heavy truck traffic, and then 11-foot lanes are a desirable minimum; that buses are as wide as 104 inches; that truck maximum is generally 96 inches; and he estimated that if the railway did not cross Washington Boulevard the street could be widened to the desired width for $111,750, that the proposed underpass structures would cost $812,756.00, making the difference due to the presence of the railway $701,015.00." [R. 17-18.]

Ralph T. Dorsey, Principal Traffic Engineer of the City of Los Angeles, applicant's witness, further testified that "the percentage of trucks using East Washington Boulevard at the underpasses in 1950 was 9,474 passenger cars vs. 2,537 trucks, the ratio being approximately 26% trucks; that these trucks go generally either up the coast, to Sepulveda Boulevard, the Valley or the harbor; the center of gravity is Washington Boulevard and Alameda, and from there the trucks move in four directions; Washington and Alameda is the center in relation to industry and the harbor, and is the focal point

of truck traffic to the 'four winds and from the hinterland'; that if Washington Boulevard were widened, trucks and autos both would make more use of it; that Washington Boulevard underpasses are about 4,300 feet east of the intersection of Washington and Alameda."

Exhibit 27, introduced by this witness, shows "the results of a traffic delay check on Washington Boulevard west of the underpass." He said that "the largest percentage of trucks using Washington Boulevard are of a local nature; that the large trucks—or the greater percentage of them and the trailers, would be through traffic; the large trucks and the reefers come from the hinterland, bringing commodities to a point of distribution which centers at Washington and Alameda; from there they go to the four tradewinds—the harbor, industry and markets, and such. That on Alameda 38% of the traffic is trucks; it is the main truck artery in the City; that the large trucks that we are talking about are the ones that come from San Francisco or Portland, coming into the industrial area or harbor."

He testified that "if the underpasses under Santa Fe's tracks were enlarged, it was his opinion that more of the large trucks very definitely would use Washington Boulevard; that at the present time there is a large turning movement to avoid the underpasses on Washington Boulevard, trucks and auto traffic avoiding these underpasses." [R. 18-19.]

"Arthur C. Jenkins, protestant's witness, qualified as a consulting engineer with many years experience in various phases of transportation problems. [R. 20.] * * *

"Mr. Jenkins recognized that the railroads receive an advantage where the hazard to the train is eliminated by

separation of grades; said that it is difficult to pass on the cost of grade separations by increasing railroad rates, because if such rates were increased the trucks would have a competitive advantage and traffic would be diverted to them; that the railroads receive benefits from eliminating grade separations by eliminating delays; the delay factor can be measured as it was in the Goshen Junction case, pursuant to the Johanson formula developed in a textbook and showing the material value upon a delay to highway traffic; [R. 26.]

"That railroads should be given priority at grade crossings because highway traffic is continuous whereas railroad operation is relatively infrequent, and because railroads would block more than one intersection if stops were made for traffic signals, and trains are too heavy to accelerate rapidly to clear traffic signals following a complete stop." * * * [R. 26.]

"That if the City put in a grade crossing over the tracks at Washington Boulevard, the Santa Fe would suffer a detriment, since a grade crossing presents a hazard—regardless of the type of protective devices there; that motor vehicles may crash even through automatic gates, which are the best type of protection; but the situation as it presently exists is no detriment to the railroad, because the grades are separated now; [R. 28.]

Frank H. Hitchcock, the General Claims Agent at Los Angeles [R. 29], testifying for the Santa Fe stated that:

"The hazard of damage to trains has increased many fold in recent years. Years ago trains seldom struck anything but a horse and buggy and pedestrians. Now tank trucks and heavy vehicles cause disastrous wrecks and

derailments primarily due to the increased size and width and character of highway vehicles. [R. 30.] * * *

"The average accident with an automobile does not damage railroad equipment. Accidents with trucks, road rolling machines, and commercial-type vehicles do cause damage to railroad equipment." [R. 30.]

"O. L. Gray, General Manager for Santa Fe, testified that there are seventeen scheduled passenger train movements and sixteen to twenty-two freight train movements daily over Washington Boulevard. [R. 30.] * * *

"Freight trains over Washington vary in content from ten to one hundred cars. Their speed does not exceed fifteen miles per hour.

"There has been substantial increase in business in this area since 1900 freightwise but not passengerwise. Including military trains, Santa Fe trains carry 1,000 to 1,200 persons daily over Washington Boulevard.

"Crossing accidents cause considerable expense and delay. For example at Azusa a gasoline truck collided with the Super Chief doing approximately $150,000.00 damage including claim costs, and delayed the train about two hours.

"One crossing accident out of twenty-five or thirty may damage a train, the damage usually consisting of damage to foot boards or handholds or ladders. A small proportion of the accidents cause damage to other equipment. Perhaps one out of fifty or sixty accidents may cause a derailment." [R. 30-31.]

"George Langsner, East District Engineer in charge of Design in the Los Angeles Metropolitan Area, Division of Highways, testified that there will be a grade separation between the Santa Ana Freeway and Wash-

ington Boulevard; that Washington Boulevard is a so-called primary or major highway built to major highway standards.

"It is not good engineering practice to narrow a six-lane highway to two lanes or four lanes.

"Washington Boulevard carries approximately ten thousand cars and trucks a day. The underpasses under Santa Fe tracks are approximately five miles from the Anaheim-Telegraph-Washington Boulevard crossing." [R. 32-33.]

"Hugo H. Winters, recalled, testified that the accidents as shown by Exhibit 28 occur partly because of the tapering of the roadway from 77 feet to the 20 feet underpasses. The exhibit shows all the accidents reported to the police department. A number of the accidents are some distance removed from the underpasses and result from changes in size of the roadway and also from the sharp curves." [R. 33.]

Appellant's summary of the record of the hearing before the Public Utilities Commission contained in Appendix "B" to its petition for writ of review was implemented by respondent City in its answer and brief [R. 147-194] by calling attention to the following evidence before the Commission:

The City of Los Angeles has a right of way or easement for street purposes at the site of the grade separations which is 90 feet in width and was acquired by negotiation and condemnation. [R. 152.] At present there are no facilities for pedestrian traffic and, further, if no proper allocation of costs of widening the existing underpasses is made, the City can build crossings at grade and trains would have to obey traffic signals. [R. 152.]

While the cost of widening the roadway by elimination of the existing underpasses and establishing a grade crossing would be $245,000, it would mean delay to both vehicular and rail traffic and be an added accident hazard. [R. 152.] The plan to widen the underpasses had its inception with the City, however the Santa Fe suggested that if this were done it should be by the use of bridges, such as provided for by the Commission's decision. [R. 153.]

In 1910 the City had a population of 102,000, and the County a population of 504,000, in 1920 the City population was 576,000 and in 1948 the City population was 1,987,000, the County being over 4,000,000. [R. 153.]

"In 1948, within a five-mile radius of the crossings here involved, there were more than 1,150,000 people, and within a ten-mile radius there were more than 2,500,000 people." [R. 153.]

"Unlike a freeway, which only serves to carry traffic, a street such as Washington Boulevard has a tremendous function in serving the properties fronting on the boulevard; freeways are entirely supplemental to the city street system and do not reduce the need of the existing street system which handles local traffic.

"A very small percentage of traffic on Washington Boulevard is through traffic that enters one end of Washington Boulevard and goes out the other end of Washington Boulevard." [R. 153.]

Mr. Jenkins, the Company witness, admitted that "there is no escaping the fact that railroad crossings constitute a hazard to life and property at the present time," and he also testified that "under present traffic conditions street

traffic presents a hazard to trains, which was 'extremely serious,' and that the elimination of such hazard was an advantage to the train." Mr. Jenkins further testified that in computing benefits to the railroad resulting from grade separations, the delay factor should be given considerable weight and that a main line railroad could not operate under signalized or synchronized control of traffic, such as that under which vehicular traffic operates. [R. 153-154.]

Mr. Jenkins also testified that "there were heavy industries in the area here involved, and that there was local traffic from such industries using Washington Boulevard. Likewise he admitted that probably 100 percent of all passenger traffic handled by railroads use city streets at some stage of their journey, so that city streets are feeders and used as feeders for the railroad business, and that a comparable situation largely exists with respect to freight, except that there is a larger percentage of freight served directly by spurs which do not involve truck connection." [R. 154.]

He likewise admitted that "the mere presence of a truck doesn't prove competition with a railroad, but instead the truck might be feeding the railroad, rather than competing with it." [R. 154.] He further admitted that "a crossing at grade would be a detriment to the Railroad." [R. 154.]

Mr. Grey, another companay witness, testified that "since 1900 there has been a very substantial increase in the business done by the Santa Fe, freightwise, over the lines using the tracks here involved; that where there is a series of tracks such as here involved; and assuming an automobile and train collision, there would be considerable

expense and delay and disruption of scheduling, which would not be reflected in claim payments; that in some accidents considerable damage is done to the Santa Fe equipment, such as when a truck collided with the Super Chief, damaging Santa Fe equipment about $150,000 and delaying the train about two hours; that a serious delay influences movement of traffic in either direction, not only at the point of the accident but further on down the line; that the tonnage now handled over these tracks is up, even greater than in 1928 or 1929 when volume was very heavy; that the San Diego line, which uses these tracks, is a very good passenger earner; that the diesel locomotives now being used handle longer trains with more tonnage, which is a benefit to the Railroad, and the longer the train the better for the Railroad, regardless of the fact that such longer trains would block grade crossings for a longer period of time." [R. 155.]

Mr. Winter (a City witness) "presented Exhibit 62 R. H., which is a land use map showing the general use of property fronting on Washington Boulevard in the vicinity of these underpasses. This shows the extensive use of Washington Boulevard for local traffic, including some 450 vehicles entering or leaving the Santa Fe yards in a 24-hour period." [R. 156.]